92-1794

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NEVIN KEAULII,

Petitioner,

v.

MICKIE SIMPSON,

Respondent.

Petition For A Writ Of Certiorari To The Hawaii Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court's construction of Hawaii Rules of Arbitration, Rule 25 and 26, imposing sanctions for Petitioner's dismissal before a jury verdict or court decision, is a substantial restriction on Petitioners right to jury trial.

2. Whether the Hawaii Supreme Court's construction of Hawaii Rules of Arbitration, Rule 25 and 26, imposing sanctions for Petitioner's dismissal before a jury verdict or a court's decision, is a taking of property without due process of law.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Nevin Keaulii and the respondent Mickie Simpson. The claims of Plaintiff Jo Anne Keaulii were dismissed.

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IN THE

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Petition For A Writ Of Certiorari To The Hawaii Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Nevin Keaulii respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Hawaii Supreme Court, entered in the above-entitled proceeding on March 31, 1993.

OPINION BELOW

The opinion of the Hawaii Supreme Court is reported at *Keaulii v. Simpson*, 847 P.2d 663, at 74 Haw. ____, (1993) and is reprinted in the appendix, pg. la. Rehearing was denied on March 31, 1993. Appendix lb.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on March 11, 1993. Rehearing was denied on March 31, 1993. Appendix lb. This Court has jurisdiction under 28, U.S.C. Section 1257(a).

STATUTES INVOLVED

U.S. Constitution, 7th Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

U.S. Constitution, 14th Amendment:

> Section 1. . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Hawaii State Constitution, Article I, Section 13:

> In suits at common law where the value in controversy shall exceed one thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

Hawaii Arbitration Rules, Rule 1. The Court Annexed Arbitration Program.

> The Court Annexed Arbitration Program (the Program) is a mandatory, non-binding arbi-

> tration program, as hereinafter described, for certain civil cases in the State of Hawaii.

Hawaii Arbitration Rules, Rule 2. Intent of Program and Application of Rules.

> (A) The purpose of the Program is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters to be designated by the Judicial Arbitration Commission.
>
> (B) These rules shall not be applicable to arbitration by private agreement or to other forms of arbitration under existing statutes, policies and procedures.
>
> (C) These arbitration rules are not intended, should they be construed, to address every issue which may arise during the arbitration process. The intent of these rules is to give considerable discretion to the arbitrator, the Arbitration Administrator and the Judicial Arbitration Commission. Arbitration hearings are intended to be informal, expeditious and consistent with the purposes and intent of these rules.

Hawaii Arbitration Rules, Rule 6:

> (A) All tort cases, including appeals or transfers from district courts, having a probable jury award value, not reduced by the issue of liability and not in excess on One Hundred Fifty Thousand Dollars ($150,000.00), exclusive of interest and costs, may be accepted into the Program at the discretion of the Judicial Arbitration Commission.

> (B) The court shall view all tort cases as arbitration eligible and automatically "in" the Program unless plaintiff certifies that his or her case has a value in excess of the jurisdictional amount of the Program which is $150,000. Plaintiff shall file a request for exemption at the time of filing and such a request shall include a summary of facts which support plaintiff's contentions.

Hawaii Arbitration Rules, Rule 19(B). Form and Content of Award.

> (B) The arbitrator shall determine all issues raised by the pleadings that are subject to arbitration under the Program, including a determination of comparative negligence, if any, damages, if any, and costs. The amount of damages that can be awarded is not limited to the jurisdictional amount for arbitration.

Hawaii Arbitration Rules, Rule 22. Request for Trial De Novo.

> (A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial De Novo of the action.
>
> (B) After the filing and service of the written Notice of Appeal and Request for Trial De Novo, the case shall be set for trial pursuant to applicable court rules.
>
> (C) If the action is triable by right to a jury, and a jury was not originally demanded but

> is demanded within ten (10) days of service of the Notice of Appeal and Request for Trial De Novo by a party having a right of trial by jury, the trial de novo shall include a jury, and a jury trial fee shall be paid as required by law.

Hawaii Arbitration Rules, Rule 25 The Prevailing Party In The Trial De Novo; Costs

> (A) The "Prevailing Party" in a trial de novo is the party who has (1) appealed and improved upon the arbitration award by 15% or more, or (2) has not appealed and the opposing party has appealed and failed to improve the arbitration award by 15% or more. For the purpose of this rule, "improve" or "improved" means to increase the award for a plaintiff or to decrease the award for the defendant.
>
> (B) The "Prevailing Party" under these rule, as defined above, is deemed the prevailing party under any statute of rule of court, and as such is entitled to costs of trial and all other remedies as provided by law.

Hawaii Arbitration Rules, Rule 26. Sanctions For Failing To Prevail In The Trial De Novo.

> (A) After the verdict is received and filed, or the court's decision rendered in a trial de novo, the trial court may, in its discretion, impose sanctions, as set forth below, against the nonprevailing party, whose appeal resulted in the trial de novo.
>
> (B) The sanctions available to the court are as follows:

> (1) Reasonable costs and fees (other than attorneys' fees) actually incurred by the party but not otherwise taxable under the law;
>
> (2) Costs of jurors;
>
> (3) Attorneys' fees not to exceed $5,000;
>
> (C) Sanctions imposed against a plaintiff will be deducted from any award rendered. Sanctions imposed against a defendant will be added to any award rendered.
>
> (D) In determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii.

STATEMENT OF THE CASE

Petitioner filed a law suit against Respondent as a result of injuries he sustained in a motor vehicle accident on September 5, 1987. Petitioner's wife at the time, Jo Anne Keaulii, also claimed loss of consortium. The case was arbitrated through the Hawaii Court Annexed Arbitration Program.

On September 25, 1989, the arbitrator issued a decision in favor of Respondent. The arbitrator wrote:

> Therefore, based upon all the facts presented during the arbitration hearing in this case, the arbitrator is uncertain as to which version of the circumstances causing the motor vehicle collision is the more accurate one, and finds that Plaintiff failed to meet the burden of proof on liability. Appendix 1c.

On September 29, 1989, Petitioner timely appealed the arbitrator's decision and requested trial *de novo*

pursuant to Hawaii Arbitration Rules, Rule 22. Appendix 1d. Thereafter, more discovery was pursued by both parties.

On June 21, 1991, a settlement conference was held in the chambers of the Honorable Frank Takao, at which time Judge Takao proposed that Petitioner dismiss his claim, and in consideration Defendant would withdraw her counter claim. In addition, Judge A. Takao admonished Petitioner that were he to **proceed to trial** and lose, sanctions may be levied against him under HAR Rule 25, and 26.

On July 26, 1991 a pre-trial conference was held in the chambers of the assigned trial judge, the Honorable Thomas K. Kaulukukui, Jr. Petitioner informed the court that because of substantial expenses incurred in his contested divorce proceeding, which was about to go to trial, as well as the possibility that he would be sanctioned were he to lose at trial, he had decided to dismiss the suit. The court allowed Petitioner to dismiss the suit with prejudice. Notice of Dismissal with Prejudice of Plaintiff Nevin Keaulii's Claim Against Defendant Mickie Simpson. Appendix 1e.

However, the court asserted jurisdiction "as trial judge, Arbitration Judge, or otherwise " to hear post-dismissal motions. On August 21, 1991 Respondent filed a "Motion for Sanctions under HAR Rule 26 of the Hawaii Arbitration Rules. On September 26, 1991, the court issued an "Order Granting Defendant Mickie Simpson's Motion for Sanctions under HAR Rule 26. The court stated, "Plaintiff is subject to sanctions under Rule 26" in the amount of $5,000 for attorney fees, and $9,192.70 in costs. Appendix 2f. Judgment, Appendix 1g.

On October 4, 1991, the Notice of Appeal, from the Order Granting Sanctions, was timely filed. Appendix 1h. The Petitioner argued in his Opening Brief On Appeal that he should prevail for the following reasons: 1). a trial *de novo* had not occurred; there was no "prevailing party"; 2). the sanctions were a *penalty* having a "chilling effect" on the right to trial, and; 3). the interpretation of the Rule 25 and 26 was unreasonable and ambiguous, constituting a taking of property without due process.

On March 11, 1993, the Hawaii Supreme Court issued its decision which held that a circuit court's decision to grant a party's motion to dismiss with prejudice prior to commencement of a jury being sworn or evidence being taken is a "decision rendered in a trial *de novo*" for which sanctions may be imposed. Appendix 1a, pg. 7a.

However, the decision of the Hawaii Supreme Court did not discuss the constitutional questions of due process, penalty due to broad construction of vague statutory provision; or whether HAR Rule 26 as construed, would violate the right to jury trial. The vague and ambiguous interpretation of Rule 25 and 26 violating due process and right to jury trial is specifically raised in Petitioners Opening Brief on Appeal:

> Clearly a rule that is essentially punitive, such as Rule 26, should be strictly construed or it would have a "chilling effect" on all litigant, and may very well undermine the right to a jury trial in civil cases, guaranteed by the 7th Amendment to the U.S. Constitution, and Article I, Section 13 of the Hawaii State Constitution.

* * * *

> . . . It is indeed ironic that what Appellant was trying to avoid (sanctions) by withdrawing his case the way he did, wound up being imposed on him almost unilaterally, ***without due process*** or the opportunity to defend himself. (Emphasis added). Appendix 1i, 9i, 10i.

On March 22, 1992 Petitioner filed for a Motion for Reconsideration [of Order Granting Defendant Mickie Simpson's Motion for Sanctions Under Rule 26 of the Hawaii Arbitration Rules] again addressing the issue of Petitioner's right to trial under the U.S. and Hawaii Constitutions, and the broad and overly comprehensive definition of *trial de novo*. Appendix 1j, pg. 2j, 5j. The Motion for Reconsideration was denied by the Hawaii Supreme Court without argument on March 31, 1993. Appendix 1b.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONSTITUTIONAL RIGHT TO JURY TRIAL IS SUBSTANTIALLY RESTRICTED BY THE GRANTING OF SANCTIONS FOR APPEAL FROM THE HAWAII ARBITRATION PROGRAM FOR A TRIAL DE NOVO WHERE DISMISSAL OCCURS PRIOR TO A JURY VERDICT OR COURT DECISION.

The 7th Amendment to the U.S. Constitution, and Hawaii Constitution, Article I, Section 13, provide the Petitioner a jury trial under the facts of this case. The Hawaii Arbitration Rules require mandatory arbitration and provide for an appeal from the arbitration decision for a trial *de novo*. The Hawaii Arbitration Rules, Rule 25 and 26, as interpreted by the Hawaii Supreme Court, awarding sanctions upon

dismissal prior to trial *de novo*, substantially and unreasonably restricts Petitioner's right to jury trial.

The validity of arbitration statutes, has generally been upheld by the U.S. Supreme Court. The Supreme Court has held that a procedure for nonjudicial determination prior to jury trial does not constitute a Seventh Amendment violation. But the case law supporting *conditions precedent* to jury trials is not absolute and conditions will violate a parties right to trial which are determined to be unreasonable, burdensome or oppressive.

> Statutes which provide for a voluntary arbitration are constitutional. Statutes which compel parties to submit to arbitration against their will or without their assent, in other words which impose compulsory arbitration, violate the Constitution **unless there is thereafter an untrammelled right to a trial by jury.** (citations omitted). The law is aptly stated in *Emerick v. Harris*, 1 Bin [416] at page 423, supra." [1808] . . . **the legislature cannot constitutionally impose any provisions substantially restrictive of the right of trial by jury** . . . the sacred, inherent right of every citizen, a trial by jury, must be preserved. . . ." (Emphasis added).

Re Smith, 112 A2d 625, 381 Pa. 223, 55 ALR 2d 420,431 (1955); appeal dismissed, 350 US 858, 100 L ed 762, 76 S. Ct. 105 (1955).

In *Capital Traction Company v. Hof*, 174 U.S. 1, 16 S.Ct. 580, 43 L.Ed 873 (1899). The Court found no Seventh Amendment violation in the arbitration system as long as the right to trial by jury was pre-

served through the appeal. In commenting that the Seventh Amendment sought to preserve the *right* to trial by jury, the Court noted that:

> [i]t [the Constitution] does not prescribe at what state of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. *Id.* at 23, 19 S.Ct. at 589.
>
> . . . by violation of the trial by jury, I understand taking it away, prohibiting it or **subjecting it to unreasonable and burdensome regulations,** which if they do not amount to a literal prohibition, are at least virtually of that character. . . . **It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired,** although it may be subjected to new modes . . . A law containing **arbitrary and unreasonable provisions,** made with the intention of annihilating or impairing the trial by jury, would be subjected to the same considerations, as if the object had been openly and directly pursued.

Id. US at 27-28, 19 S. Ct. at 590. (Emphasis added).

The determination of "reasonableness" of a condition affecting right to trial, was at issue in the case of *Re Smith, supra.* A condition to the right of appeal from an arbitrators' decision was a statutorily imposed payment of accrued costs, including arbitrators' fees and the giving of a recognizance for the payments of costs to accrue in the appealed proceedings.

The court held payment of costs as a condition to appeal valid and not violative of the right to trial:

> All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be *burdened* by the imposition of **onerous conditions, restrictions or regulations.** . . . *Id.* A.2d 629; Pa. 231.

The legal system of Hawaii requires that for a traffic accident case, where the tort claim in the complaint is less than $150.000, that upon filing the complaint the action is place in the arbitration program. This is a *mandatory system*, pursuant to HAR Rule 1,6(A)(B), for torts claims.

In such an arbitration proceeding, there is no jury. To protect the parties constitutional right to jury trial, HAR Rule 22, provides for an appeal from the arbitration award *including a trial de novo.*

Petitioner in accordance with the above provisions of HAR 22 filed his written Notice of Appeal and Request for Trial De Novo. In addition, Petitioner was eligible for a trial by jury through Defendant filing a Demand for Jury Trial, with his Answer to Petitioner's complaint. Appendix 1k.

Petitioner continued to prepare for trial and incurred additional expenses and costs due to discovery. After completing discovery, Petitioner was in a financial crisis due to pursuing this litigation, and due to an impending divorce. Thus, Petitioner had the case dismissed before trial with prejudice. This act of dismissal was done to foreclose the possibility that in the event that Petitioner was not the prevailing party, as defined in HAR Rule 25, he would not incur sanctions, attorney fees and costs. Petitioner's action of dismissal was in conformity with and upon reliance

of the Honorable Judge Takao admonishment at the settlement conference on June 21, 1991, that were Petitioner to lose at trial sanctions could be assessed against him. The Judge's admonishment was also in conformity with Petitioner's understanding of HAR, Rule 25 and 26.

Hawaii Arbitration Rules, Rule 25, provides:

> (A) The "Prevailing Party" in a *trial de novo* is the party who has (1) appealed and improved upon the arbitration award by 15% or more, or (2) has not appealed and the opposing party has appealed and failed to improve the arbitration award by 15% or more. For the purpose of this rule, "improve" or "improved" means to increase the *award* for a plaintiff or to decrease the award for the defendant.
>
> (B) The "Prevailing Party" under these rule, as defined above, is deemed the prevailing party under any statute or rule of court, and as such is entitled to costs of trial and all other remedies as provided by law.

Hawaii Arbitration Rules, Rule 26, provides for sanctions *after* a verdict or court decision:

> (A)**After the verdict is received and filed, or the court's decision rendered in a trial de novo,** the trial court may in its discretion, **impose sanctions,** as set forth below, **against the nonprevailing party,** whose appeal resulted in the trial *de novo*. (Emphasis added).

At the post-dismissal hearing on Defendant's Motion for Sanctions, after Petitioner had dismissed the

action, Petitioner was ordered sanctioned. Appendix 1f.

The Hawaii Supreme's Court's interpretation of HAR Rule 25 and 26, awarding sanctions where a dismissal with prejudice occurs, before empaneling a jury, before a verdict or court decision, is *not* a trial *de novo* and has a "chilling effect" and is a substantial and unreasonable restriction upon Petitioners right to trial.

The Hawaii Supreme Court's interpretation of HAR 25 and 26, is an **unreasonable restriction** upon a right to jury trial because when a party asserts his right to a jury trial *de novo* he may be *sanctioned or penalized* by the court without ever having a decision rendered by a jury or court.

The Hawaii Supreme Court's interpretation of HAR Rule 25, 26, goes *far* beyond the line of cases that approved the payment of costs as a condition of appeal *de novo*. *Cf. Parker v. Children's Hospital of Philadelphia*, 394 A.2d 932, 483 Pa. 106 (1978); *Kimbrough v. Holliday Inn*, 478 F.Supp. 566 (U.S. Dist. Ct. E.D. Penn. 1979). The requirement that the Petitioner *incur sanctions* is obviously designed to serve as a brake or deterrent on the taking of frivolous and wholly unjustified appeals. But to impose the sanctions when a trial *de novo* or *any hearing* regarding the merits has not occur, is to unreasonably punish Petitioner for asserting his right to a jury trial.

Under the Hawaii Supreme's Court's interpretation of Rule 25 and 26, a party's right to appeal for a jury trial *de novo* is substantially impaired by an unreasonable burden because, if he exercises his right to jury trial, and then the next day or any time before

trial, due to new facts discovered, an insolvent Defendant or other contingencies, dismisses his claims, *substantial sanctions* may be imposed for the dismissal.

The real threat of penalty to a party for dismissal after appealing for a jury trial *de novo, is not a untrammelled right to jury trial,* but an unreasonable, and oppressive restriction upon Petitioner's right to a jury trial.

II. THE HAWAII SUPREME COURT'S CONSTRUCTION OF HAR RULE 25 AND 26, IMPOSING SANCTIONS PRIOR TO TRIAL WAS WITHOUT REASONABLE NOTICE, CONSTITUTING A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The 14th Amendment to the U.S. Constitution states that no state shall deprive any person of life, liberty, or property, without due process of law.

It is a general principle of statutory law that a statute must be definite to be valid. *It has been recognized that a statute is so vague as to violate the due process clause of the United States Constitution where its language does not convey sufficient definite warning as to the prescribed conduct when measured by common understanding and practices, or stated otherwise where its language is such that men of common intelligence must necessarily guess at its meaning.* 16 A *Am Jur 2d.* Section 818, pg. 988. (Emphasis added).

The due process requirements of definiteness is especially important in its application to penal statutes. Due process requires a penal statute to be sufficiently explicit to inform those who are subject to it **what conduct on their part will render them liable to its penalties.** *Id.* Section 818, pg. 989 (Emphasis added);

Kay v. United States, 303 US 1, 82 L.Ed 607, 58 S.Ct. 468 (1938).

"The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitution". 16 *Am Jur 2d.* (1979), Section 818, pg. 992. (Emphasis added); *Scull v. Virginia*, 359 US 344, 3 L.Ed 2d 865, 79 S.Ct. 838 (1959). [where vagueness might induce individuals to forego their rights to speech, press, and association for fear of violating unclear law].

HAR Rule 26, *imposes sanctions* and *is essentially punitive.* Statutes which impose penalties, should be *strictly construed.* Statutes which impose sanctions must be *clear, plain* and *obvious* to give notice to the public when penalties will be imposed. This is a basic tenant of due process.

In addition, being Rule 26 affects Petitioner's constitutional right to trial and due process, by imposing a penalty upon Petitioner which effects his person and property, a broad and unreasonable interpretation of HAR Rule 25 under these circumstances will not be tolerated.

The court's interpretation of HAR Rule 25 and 26, imposing sanctions upon dismissal, is not the clear, ordinary, obvious, nor plain meaning of the rule. The court's misconstrued and twisted interpretation of *trial de novo* and the imposition of sanctions where no hearing whatsoever has occurred on the merits, **is not consistent with a strict interpretation of Rule 26 and did not put Petitioner on notice that he could incur sanctions for a dismissal prior to a jury verdict or court decision.**

As is clear from the pain, unmistakable language of the HAR Rule 25 and 26, sanctions are only authorized after a jury verdict or court decision has been rendered. In other words, there must be a final decision on the merits, before the court can exercise its discretion to award sanctions. Section "A" provides authority to levy sanctions *after* the verdict or bench decision. It is hard to envision clearer language in a statute or rule of court. Section "C" contains language that clearly implies that a final decision is a necessary prerequisite because it states that sanctions against a plaintiff will be "deducted from any award rendered," and sanctions against a defendant will be "added to any award rendered." Not only is the jury award or court award in the trial *de nov* the means of prescribing *when* sanctions may be awarded in the court's discretion, but it provides *how* sanctions are to be awarded. In other words, the jury or court award in the trial *de novo* provides the measuring stick: sanctions either offset an unfavorable award a plaintiff received in a trial *de novo* or they augment an award that was unfavorable to a defendant. The jury or court award is compared to the arbitration award and the 15% formula provided for in Rule 25 is applied.

It is well established that the fundamental starting point for interpreting a statute or rule of court is the language itself, and where the language is plain and unambiguous, a court's sole duty is to give effect to the plain and obvious meaning. *Kaiser Foundation Health Plan, Inc. v. Department of Labor and Industrial Relations, Unemployment Ins. Div.*, 762 P.2d 796, 70 Haw. 72 (1988); *National Union Fire Ins. Co. v. Ferreira*, 790 P.2d 910, 71. Haw. 341 (1990). The

plain and obvious meaning is that a jury or court award must be made, and then the amount sanctioned is applied to that award.

If the legislative had intended that sanctions could be awarded by the *filing* of a Notice of Appeal for Trial *de novo* or upon *dismissal* short of trial, it could have *clearly* and *plainly* said so. Then, Petitioner would have had notice that upon exercising his right to jury trial, by filing of a Notice of Appeal for Trial De Novo, he might be subjected to substantial penalties for dismissal before trial.

CONCLUSION

The determination of the constitutional issues in this case affects tens of thousands of persons who are required to first arbitrate their claims before a trial *de novo*, with a jury, is available to them.

For the reasons stated above, this petition for certiorari should be granted to review the judgment and opinion of the Hawaii Supreme Court, entered in the above-entitled proceeding on March 31, 1992.

Respectfully submitted,

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APPENDIX

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IN THE SUPREME COURT OF THE STATE OF HAWAII

No. 15645

NEVIN KEAULII,
Plaintiff-Appellant,

and

JO ANNE KEAULII,
Plaintiff,

v.

MICKIE SIMPSON,
Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT

CIV. NO. 88-3890

March 11, 1993

LUM, C.J., MOON AND LEVINSON, JJ., AND RETIRED JUSTICE HAYASHI,* - ASSIGNED BY REASON OF VACANCY AND INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE HEEN IN PLACE OF KLEIN, J., RECUSED

ARBITRATION—costs

For purposes of Rule 26 of the Hawaii Arbitration Rules, a circuit court's decision to grant a party's motion to dismiss with prejudice prior to the commencement of a jury being sworn or evidence being taken is a "decision rendered in a trial *de novo*" for which sanctions may be imposed.

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* Retired Justice Yoshimi Hayashi, who heard oral argument in this case, was unavailable for signature when this order was filed. *See* HRS § 602-10 (1965).

OPINION OF THE COURT BY LUM, C.J.

This case involves the question of whether the circuit court may impose sanctions, under Rule 26(A) of the Hawaii Arbitration Rules (HAR), against a party who appeals from an unfavorable arbitration decision but dismisses the case "with prejudice" before the evidentiary portion of the trial.

For the reasons set forth below, we hold that for purposes of Rule 26 of the HAR a circuit court's decision to grant a party's motion to dismiss with prejudice is a "decision rendered in a trial *de novo*" for which sanctions may be imposed.

I.

This case arises out of a September 5, 1987 automobile accident. Appellant Nevin Keaulii (Keaulii) sued appellee Mickie Simpson (Simpson), alleging that Simpson negligently rear-ended Keaulii. The dispute was referred to the Court Annexed Arbitration Program (CAAP). The arbitrator found Simpson was not liable and awarded no damages to Keaulii.

Keaulii timely appealed to the circuit court and requested a trial *de novo*.[1] trial date was set and Simpson

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[1] Rule 22 of the Hawaii Arbitration Rules provides:

> *Rule 22.Request For Trial De Novo.*
>
> (A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial *De Novo* of the action.
>
> (B) After the filing and service of the written Notice of Appeal and Request for Trial *De Novo*, the case shall be set for trial pursuant to applicable court rules.
>
> (C) If the action is triable by right to a jury, and a jury

proceeded with discovery. In preparation for trial, Simpson incurred $13,631.00 in attorneys' fees, $9,192.70 in costs, and $4,815.00 in expert witness fees.

The evidentiary phase of the trial was scheduled to begin on July 29, 1991. At a pretrial conference on July 26, 1991 Keaulii moved to dismiss his claims "with prejudice." The circuit court later granted Keaulii's motion.

Simpson then moved for sanctions and the circuit court ordered Keaulii to pay Simpson $5,000.00[2] for attorneys' fees and $9,192.70 for costs.[3]

This appeal followed.

II.

In sum, the question raised by appellant is whether, for purposes of imposing sanctions under HAR 26, the circuit court's dismissal with prejudice was a "decision rendered in a trial *de novo*."

Keaulii contends there was no court decision rendered in a trial *de novo* and therefore the trial court could not award sanctions under HAR 26(A). Keaulii's points of error challenge the following circuit court findings and conclusions:

> **(3) Rule 2(A) of the Hawaii Arbitration Rules states that, 'the purpose of the Program is to provide a simplified procedure for obtaining a prompt and *equitable* resolution of certain civil**

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was not originally demanded within ten (1) days of service of the Notice of Appeal and Request for Trial *De Novo* by a party having the right of trial by jury, the trial *de novo* shall include a jury, and a jury trial fee shall be paid as provided by law.

[2] HAR 26(B)(3) limits an award of attorney's fees to $5,000.00.

[3] HAR 26(B)(1) allows awards of "reasonable costs and fees actually incurred."

matters . . . .' Rule 2(C) states that, 'these arbitration rules are not intended, nor should they be construed, to address every issue which may arise during the arbitration process.' Rules 25 and 26 provide that sanctions may be awarded in the Court's discretion. Rule 25(A) defines the term 'prevailing party' for the purposes of sanctions. Rule 26(D) provides that in determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii.'

(4) Although circumstances in this case are unusual, Rules 25 and 26 do apply. Plaintiff dismissed the case and the appeal on the day of trial, after Defendant had incurred substantial post-award fees and costs. Defendant is the 'prevailing party' within the meaning of Rule 25(A). Plaintiff is subject to sanctions under Rule 26. Plaintiff is liable to Defendant for reasonable costs and fees pursuant to Rules 26(B)(1) and (3). The amounts sought by Defendant in sanctions are reasonable and were actually incurred. The Court finds that these amounts are in excess of $5,000.00 in attorney's fees, and $9,192.70 in costs.

(5) Pursuant to Haw. Rev. Stat. Section 603-21.9(1) and (6), the interests of justice require that the Court grant sanctions against Plaintiff, in order to promote justice in the case.

(Emphasis in original.)

III.

The findings and conclusions contained in paragraph (3) are obviously neither erroneous nor contrary to law as the paragraph merely quotes and accurately summarizes parts

of Rules 2, 25, and 26 of the HAR. Keaulii makes no argument about paragraph (5) and therefore we do not consider it further. *See* HRAP 28(b)(4)(c) (requiring explanation why findings or conclusions are wrong) and HRAP 28(b)(7) (requiring argument); *Ala Moana Boat Owners Ass'n v. State*, 50 Haw. 156, 434 P.2d 516 (1967) (an appeal may be dismissed for failure to comply with rule requiring, *inter alia*, "a concise argument.")

We think the circuit court's paragraph (4) is a correct summation of the Rules and policies applicable to this case.

HAR 26(A) provides:

> **After the verdict is received and filed, or the court's decision rendered in a trial *de novo*, the trial court may, in its discretion, impose sanctions, as set forth below, against the non-prevailing party whose appeal resulted in the trial *de novo*.**

A grant of attorney's fees under HAR 26 is a conclusion of law, reviewable under the right/wrong standard. *Kealoha v. County of Hawaii*, 74 Haw. ___, ___ P.2d ___ (1993) (Slip Op.No. 15963 Jan. 15, 1993); *See also Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. ___, 839 P.2d 10 (1992) (a conclusion of law is freely reviewable).

When considering rules promulgated by courts, principles of statutory construction apply. *State of Washington v. Saldano*, 36 Wash. App. 344, 675 P.2d 1231, 1235 (1984). Statutory provisions must be read in the context of the entire statute and interpreted in a manner consistent with the purposes of the statute. *State v. Kumukau*, 71 Haw. 218,, 787 P.2d 682 (1990). A court is not obligated to construe statutes literally if to do so would bring about absurd results. *E.g.*; *State v. Ogata*, 58 Haw. 514, 572 P.2d 1222 (1977).

In this case the trial court correctly noted the purpose of the HAR is to provide a simplified procedure for ob-

taining a prompt and equitable resolution of certain civil matters. HAR 2(A); *Kealoha v. County of Hawaii*, 74 Haw. ___, ___ P.2d ___ (1993) (Slip Op. No. 15963 Jan. 15, 1993). We have also recently noted that the purpose of potential sanctions is to discourage baseless appeals from arbitration awards and thus to discourage further costs and expenses of trial. *Kealoha v. County of Hawaii*, 74 Haw. ___, ___ P.2d ___ (1993) (Slip Op. No. 15963 Jan. 15, 1993).

Here Keaulii elected to attempt to improve upon the arbitrator's decision by requesting a trial *de novo*. In preparation for the trial, Simpson incurred considerable expense, only to have the case dismissed as a result of Keaulii's motion. Keaulii's actions in demanding and pursuing a trial *de novo* plainly did not "improve[] upon the arbitration award by 15% or more" and he is therefore not a prevailing party. HAR 25(A).[4]

Keaulii argues that Rule 26 cannot provide a basis for sanctions because the order of dismissal was not a "decision rendered in a trial *de novo*."[5] Keaulii's interpretation

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[4] HAR 25(A) provides:

> ***Rule 25. The Prevailing Party In The Trial De Novo; Costs.***
>
> ***(A) The "Prevailing Party" in a trial*** *de novo* is the party who has (1) appealed and improved upon the arbitration award by 15% or more, or (2) has not appealed and the opposing party has appealed and failed to improve upon the arbitration award by 15% or more. For the purposes of this rule, "improve" or "improved" means to increase the award for a plaintiff or to decrease the award for the defendant.

[5] **Keaulii also opines that the dismissal was not a decision on the merits. This is not a claim we need to address in order to resolve this case. We note however, that the dismissal was, at Keaulii's request, with prejudice. Thus, there is nothing further to be decided about the merits of Keaulii's claims. *See, e.g., Havec v. Belk*, 775 F.2d 1209 (4th Cir. 1985) (res Judicata effect of dismissal with**

of the phrase "trial *de novo*" is not required by the rule and would lead to an absurd and inequitable result, wholly inconsistent with the purpose of the CAAP.

A trial *de novo* under the Hawaii Arbitration Rules is simply a trial proceeding not bound by the findings or conclusions of the arbitrator. The word "trial" is not a word of rigid definition and it must be read in the context in which it is used. *Cf., e.g., People v. Agnew*, 85 Ill. Dec. 514, 516, 105 Ill. 2d 275, 473 N.E.2d 1319 (1985) (statute allowing attorneys to be paid for each day actually employed in the "trial of an appellate case applied to proceedings in the appellate court, including oral argument); *Jones v. Houston Materials Co.*, 477 S.W.2d 694 (Tx. Civ. App. 1972) (summary judgment proceeding a trial within rule providing for amendment of pleadings). A literal reading of HAR 26 does not require us to limit an award of sanctions to those cases in which a jury is sworn or evidence is taken and such a limitation would be wholly inconsistent with the purpose of the HAR and the CAAP. Therefore, we hold that for purposes of Rule 26 of the HAR a decision granting a party's motion to dismiss with prejudice prior to commencement of a jury being sworn or evidence being taken is a "decision rendered in a trial *de novo*" for which sanctions may be imposed.

The judgment of the circuit court is affirmed.

Thomas J. Kaster (Erlinda Dominguez and Thomas E. Walsh with him on the brief of The Law Offices of Erlinda Dominguez) for plaintiff-appellant

Jonathan L. Ortiz (Paul T. Yamamura and Dennis E.W. O'Connor, Jr. with him on the brief of Ortiz & Yamamura) for defendant-appellee

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prejudice); *Associates Inc. v. Chrysler Motors Corp*, 405 F.2d 958 (5th Cir. 1968) (res judicata effect of dismissal with prejudice).

IN THE SUPREME COURT OF THE STATE OF HAWAII

No. 15645

NEVIN KEAULII,
Plaintiff-Appellant,

and

JO ANNE KEAULII,
Plaintiff,

v.

MICKIE SIMPSON,
Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT

CIV. NO. 88-3890

March 31, 1993

LUM, C.J., MOON AND LEVINSON, JJ., AND RETIRED JUSTICE HAYASHI,* - ASSIGNED BY REASON OF VACANCY AND INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE HEEN IN PLACE OF KLEIN, J., RECUSED

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* Retired Justice Yoshimi Hayashi, who heard oral argument in this case, was unavailable for signature when this order was filed. *See* HRS § 602-10 (1965).

The motion for reconsideration filed by Plaintiff-Appellant Nevin Keaulii on March 22, 1993, is denied without argument.

Erlinda Dominguez, Richard M. Berger, Thomas E. Walsh, and Paul M. Dold for Plaintiff-Appellant Nevin Keaulii

LUM
MOON
LEVINSON
HEEN
[Justices]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Civil No. 88-3890-12

Arbitration No. 88-613

ARBITRATION AWARD

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendant.

ARBITRATION AWARD

This matter having been arbitrated in accordance with the Hawaii Arbitration Rules,

The Arbitrator finds as follows:

Plaintiff contends that his personal injuries resulted from an automobile accident caused by the Defendant when she negligently drove her vehicle into the rear of Plaintiff's vehicle causing a collision. In support of Plaintiff's contention, Plaintiff testified that while proceeding in the Ewa direction on H-1 freeway, he was "pushed" by another vehicle from the rear end of his vehicle. This caused him to lose control of his vehicle, exit H-1 to the right shoulder, re-enter H-1, and collide with the center guard rail of the freeway. In support of Plaintiff's version of the facts, he also admitted into evidence the testimony of Gordon Young who was one of the Honolulu Police Officers who investigated the accident. During Officer Young's direct testimony, which was in accordance with the conclusions reached in the police report, which was also admitted into

evidence, Officer Young testified that in his opinion, Plaintiff's versions of the automobile collision was correct. However, on cross-examination by Defendant's attorney, Officer Young admitted that the factual evidence he observed at the scene did not rule out the version of the accident that the Defendant was promoting. Therefore, Officer Young's corroboration of Plaintiff's version was not very strong.

Defendant contends, on the other hand, that the Plaintiff's truck suddenly appeared in front of her car as she was proceeding Ewa on H-1 freeway, causing her to collide into Plaintiff's vehicle. Defendant's version of the accident in question was verified during the deposition of an independent witness, Rick Little. Mr. Little's deposition was introduced as evidence by stipulation of the parties. It should be noted that Mr. Little's earlier statement to the police, which is contained in the police report, seems to corroborate more Plaintiff's version of the accident than Defendant's. However, this deposition testimony, which is much more specific and detailed, corroborated Defendant's version of the collision.

Plaintiff's credibility is somewhat in question because Plaintiff testified that he had three or four beers prior to the collision; however, the medical records introduced into evidence show that shortly after the accident, Plaintiff's blood alcohol level was .236, which indicates that Plaintiff had consumed a great deal more alcohol than one would expect to find in three or four beers. Plaintiff also had difficulty in explaining his whereabouts from about midnight, when he left the Dirty Dan Saloon on Sand Island, and the accident which occurred approximately 2:30 a.m. - 2:45 a.m. the next morning. Also taking into consideration that Plaintiff had put in a full day's work and then a full night of celebration, and during the accident Plaintiff suffered a head injury, which caused him to feel "blacked-out" or "dazed." These circumstances could have led

Plaintiff to an inaccurate recollection of the incidents leading up to his injuries.

Officer Young testified that the debris noted on the highway which, led him to determine the point of impact, was mud from under the wheel wells of the automobiles. However, it appears that if in fact Defendant's vehicle hit Plaintiff's vehicle from the rear with such force as to cause Plaintiff to lose control and continue to lose control of his vehicle for several hundred feet, that the point of impact would contain glass or metal or some other automobile fragments other than just wheel well dirt.

It should also be noted that Mr. Little's testimony in his deposition was consistent with what one would expect could happen to a person in Plaintiff's situation, i.e. driving home late at night on the freeway with a .236 blood alcohol content after working an entire day as a welder, and then celebrating and drinking several hours more. It would not be an uncommon experience for someone under those conditions to dose off while driving and have the vehicle slowly leave the highway as Mr. Little described.

Mr. Little's testimony has to be given a great deal of weight since he is an independent witness and has no interest in the outcome of this case. However, it is disturbing that Mr. Little's deposition testimony is somewhat different than the statement he was alleged to have given to the police directly after the accident.

Therefore, based upon all the facts presented during the arbitration hearing in this case, the arbitrator is uncertain as to which version of the circumstances causing the motor vehicle collision is the more accurate one, and finds that Plaintiff failed to meet the burden of proof on the issue of liability.

During the pre-arbitration hearing, Defense counsel asserted in his pre-hearing statement that Defendant Simpson had asserted a counter-claim against Plaintiff for

pursuant [pursuit] of a frivolous claim and Defendant seeks an award of reasonable attorney's fees under Hawaii Revised Statutes, Section 607-14.5. However, in examining the answer filed by Defendant, the arbitrator could not find a copy of said counter-claim. In any event, the arbitrator finds that there were sufficient facts independent of Plaintiff's testimony which tended to support his version of the circumstances leading up to the vehicle collision, i.e. the conclusions reached by the Honolulu Police Department in their police report and investigation of the accident.

Therefore, the arbitrator finds that Plaintiff's claim was not frivolous and an award of attorney's fees will be made to Defendant. Each party shall pay their own attorney's fees and costs with this one exception. During the discovery phase of this claim, the Defendant and Plaintiff agreed to take the deposition of Defendant's witness, Mr. Rick Little, on the mainland. By agreeing to attend the deposition and stipulating to receive the deposition in evidence in lieu of live testimony during the arbitration hearing, Plaintiff saved Defendant a substantial amount in litigation expenses. At the time that the arbitrator approved of the taking of Mr. Little's deposition, the arbitrator reserved finding who should pay the costs of said deposition. It is the decision of the arbitrator that Defendant shall pay to Plaintiff's mainland co-counsel, Hippenmeyer, Reilly & Moody, S.C. the amount of $408.14, which were the costs associated with the deposition of Mr. Rick Little.

1. *Liability*

For Plaintiff	_____
For Defendant	x

2. *Damages*

Special Damages	$ -0-
General	$ -0-
Punitive Damages	$ -0-

Loss of Consortium	$ -0-
3. Costs to the Plaintiff's Co-Counsel Hippenmeyer, Reilly & Moody, S.C. to be paid by Defendant	$408.14
4. Each party pay their own attorney's fees and costs (except for 3 above)	

DATED: Honolulu, Hawaii, September 25, 1989.

/s/ Edgar R. Worth
EDGAR R. WORTH
Arbitrator

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12
ARBITRATION NO. 88-613

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendant.

PLAINTIFFS' NOTICE OF APPEAL AND REQUEST FOR TRIAL *DE NOVO*; EXHIBIT "A"; CERTIFICATE OF SERVICE

PLAINTIFFS' NOTICE OF APPEAL AND REQUEST FOR TRIAL DE NOVO

COME NOW PLAINTIFFS NEVIN KEAULII and JO ANNE KEAULII, by and through their undersigned counsel, and hereby appeal the Arbitration Award (Exhibit "A" hereof) rendered on September 26, 1989 and request a trial *de novo* in the above-entitled matter pursuant to Rule 22, *Hawaii Arbitration Rules*, as amended.

DATED:Honolulu, Hawaii, September 29, 1989.

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
THOMAS KASTER
Attorneys for Plaintiffs
NEVIN KEAULII and JO ANNE KEAULII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12
(Motor Vehicle Tort)

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendant.

NOTICE OF DISMISSAL WITH PREJUDICE OF PLAINTIFF NEVIN KEAULII'S CLAIM AGAINST DEFENDANT MICKIE SIMPSON; CERTIFICATE OF SERVICE

Trial Date: July 29, 1991
Trial Judge: Thomas K. Kaulukukui, Jr.

NOTICE OF DISMISSAL WITH PREJUDICE OF PLAINTIFF NEVIN KEAULII'S CLAIM AGAINST DEFENDANT MICKIE SIMPSON

COMES NOW Plaintiff NEVIN KEAULII, by and through his undersigned counsel, and files herein this notice of dismissal with prejudice of his claim against Defendant MICKIE SIMPSON.

This notice of dismissal with prejudice of Plaintiff NEVIN KEAULII'S claim against Defendant MICKIE SIMPSON is done pursuant to Rule 41(a)(2) of the Hawaii Rules of Civil Procedure.

There are no other issues, claims and/or parties that remain in this case.

DATED: Honolulu, Hawaii, July 31, 1991.

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
THOMAS J. KASTER
Attorneys for Plaintiff
NEVIN KEAULIIO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12

(MOTOR VEHICLE TORT)

NEVIN KEAULII, et al.,

Plaintiffs,

vs.

MICKIE SIMPSON,

Defendant.

ORDER GRANTING DEFENDANT MICKIE SIMPSON'S MOTION FOR SANCTIONS UNDER RULE 26 OF THE HAWAII ARBITRATION RULES; NOTICE OF ENTRY

ORDER GRANTING DEFENDANT MICKIE SIMPSON'S MOTION FOR SANCTIONS UNDER RULE 26 OF THE HAWAII ARBITRATION RULES

On September 5, 1991, a hearing was held in the above-entitled matter. Present were Thomas Kaster, Esq. representing the Plaintiff and Jonathan Ortiz, Esq. representing the Defendant. The Court received evidence and heard arguments, then took this matter under advisement.

After considering the records, file and other relevant matters, the Court finds and concludes as follows.

1. The court has jurisdiction under Haw.Rev.Stat. Section 603-21.5(3). This Court is also the Arbitration Judge, and thus the court also has jurisdiction under the Hawaii Arbitration Rules, including Rule 3.

2. The Court has the power under Haw. Rev. Stat. Section 603-21.9(1) and (6) to grant or deny relief in this case. As Arbitration Judge, the Court also has power to grant or deny relief under Hawaii Arbitration Rules 3(b), 25 and 26.

3. Rule 2(A) of the Hawaii Arbitration Rules states that, "the purpose of the Program is to provide a simplified procedure for obtaining a prompt and *equitable* resolution of certain civil matters. . . ." Rule 2(C) states that, "these arbitration rules are not intended, nor should they be construed, to address every issue which may arise during the arbitration process." Rules 25 and 26 provide that sanctions may be awarded in the Court's discretion. Rule 25(A) defines the term "prevailing party" for the purposes of sanctions. Rule 26(D) provides that "in determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii."

4. Although circumstances in this case are unusual, Rules 25 and 26 do apply. Plaintiff dismissed the case and the appeal on the day of trial, after Defendant had incurred substantial post-award fees and costs. Defendant is the "prevailing party" within the meaning of the Rule 25(A). Plaintiff is subject to sanctions under Rule 26. Plaintiff is liable to Defendant for reasonable costs and fees pursuant to Rules 26(B)(1) and (3). The amounts sought by Defendant in sanctions are reasonable and were actually incurred. The Court finds that these amounts are in excess of $5,000.00 in attorney's fees, and $9,192.70 in costs.

5. Pursuant to Haw. Rev. Stat. Section 603-21.9(1) and (6), the interests of justice require that the Court grant sanctions against Plaintiff, in order to promote justice in this case.

Therefore, IT IS HEREBY ORDERED that Defendant Mickie Simpson's Motion for Sanctions is GRANTED.

Plaintiff shall pay to Defendant $5,000.00 in attorney's fees and $9,192.70 in costs.

DATED: Honolulu, Hawaii, September 26, 1991.

/s/ Thomas K. Kaulukukui
THOMAS K. KAULUKUKUI
Arbitration Judge

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12
(Motor Vehicle Tort)

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendant.

JUDGMENT

TRIAL: July 29, 1991
JUDGE THOMAS KAULUKUKUI

JUDGMENT

Plaintiff NEVIN KEAULII, having moved the Court pursuant to Rule 41(a)(2) of the Hawaii Rules of Civil Procedure that his Complaint be dismissed with prejudice, and such motion having been granted on July 26, 1991 upon the condition that the Court retain jurisdiction over any post dismissal motions including motions under the Hawaii Arbitration Rules; and

Defendant Mickie Simpson's Motion for Sanctions, under Rules 25 and 26 of the Hawaii Arbitration Rules, having come on for heaving before this Court on September 5, 1991, and such motion having been granted on September 26, 1991; and

This Court having determined that Defendant Mickie Simpson was entitled to an award of costs in the amount

of $9,192.70 and attorneys' fees in the amount of $5,000.00; and

NOW THEREFORE, IT IS HEREBY ADJUDGED, ORDERED AND DECREED that Judgment be entered pursuant to Rule 58 of the Hawaii Rules of Civil Procedure against Plaintiff in the amount of $5,000 in attorneys' fees and $9,192.70 in costs, for a total Judgment of $14,192.70, together with post judgment interest at the statutory rate to run from the date of this Judgment.

DATED: Honolulu, Hawaii, November, 12, 1991.

/s/ Judge of the Above Entitled Court
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
THOMAS KASTER

Attorneys for Plaintiff
NEVIN KEAULII

KEAULII v. SIMPSON, Civil No. 88-3890-12 - JUDGMENT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12
(Motor Vehicle Tort)

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendant.

NOTICE OF APPEAL; EXHIBIT "A"; CERTIFICATE OF SERVICE

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff NEVIN KEAULII, by and through his undersigned attorneys, pursuant to Section 641-1, *Hawaii Revised Statutes* and Rules 3 and 4 of the *Hawaii Rules of Appellate Procedure*, appeals to the Supreme Court and the Intermediate Court of Appeals of the State of Hawaii from the **Order Granting Defendant Mickie Simpson's Motion for Sanctions Under Rule 26 of the Hawaii Arbitration Rules,** filed herein on September 26, 1991, and attached hereto as Exhibit "A".

DATED:Honolulu, Hawaii, October 4, 1991.

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
THOMAS J. KASTER
Attorneys for Plaintiff
NEVIN KEAULII

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 88-3890
(Motor Vehicle Tort)

NEVIN KEAULII,
Plaintiff-Appellant,

and

JO ANNE KKEAULII,
Plaintiff,

vs.

MICKIE SIMPSON,
Defendant-Appellees.

APPEAL FROM THE ORDER GRANTING DEFENDANT MICKIE SIMPSON'S MOTION FOR SANCTIONS UNDER RULE 26 OF THE HAWAII ARBITRATION RULES; NOTICE OF ENTRY FILED SEPTEMBER 26, 1991

FIRST CIRCUIT COURT

HONORABLE ROBERT G. KLEIN
HONORABLE PATRICK K.S.L. YIM
HONORABLE PHILIP CHUN
HONORABLE SIMEON ACOBA, JR.
HONORABLE FRANK TAKAO
HONORABLE THOMAS K. KAULUKUKUI, JR.
Judges

PLAINTIFF-APPELLANT NEVIN KEAULII'S OPENING BRIEF

The parties to this appeal are Plaintiff-Appellant NEVIN KEAULII (hereinafter referred to as "Appellant" and

Defendant-Appellee MICKIE SIMPSON (hereinafter referred to as "Appellee".

I. STATEMENT OF JURISDICTION

On September 26, 1991 an Order Granting Defendant Mickie Simpson's Motion For Sanctions Under Rule 26 of the Hawaii Arbitration Rules and Notice of Entry was filed in the First Circuit Court, sanctioning Appellant $5,000.00 in attorney's fees and $9,192.70 in costs, to be paid to Appellee. [Record on Appeal (hereinafter "RA", Vol.3, pp. 335-37.] Thereafter, a timely Notice of Appeal of this order was filed by Appellant on October 4, 1991. [RA, Vol.3, pp. 338-43.]

This court has jurisdiction over this appeal under *Harada v. Ellis*, 60 Haw. 467, 591 P.2d 1060 (1979), which provides that an order imposing sanctions on a party and directing immediate payment of costs to the opposing party is immediately appealable. In addition, jurisdiction is conferred by *City and County of Honolulu v. Midkiff*, 57 Haw. 273, 554 P.2d 233 (1976), which provides that where a trial court's disposition of a case is embodied in several orders, no one of which encompasses the entire controversy but collectively do so, the entry of the last of a series of orders gives finality and appealability to all. Sections 602-5 and 641-1, as well as Rule 4 of the Hawaii Rules of Appellate Procedure provide further grounds for this Court's jurisdiction.

II. STATEMENT OF THE CASE

Appellant filed a lawsuit against Appellee as a result of injuries he sustained in a motor vehicle accident on the H-1 freeway on September 5, 1987, and Appellee's wife at the time, Plaintiff Jo Anne Keaulii, claimed for loss of consortium. [RA, pp. 1-10.] [RA, Vol.1, pp. 1-10.] The case was arbitrated through the Court Annexed Arbitration Program and at the hearing Appellant testified that Appellee drove her vehicle into the rear of Appellant's ve-

hicle, causing a collision. [RA, Vol.3, pp. 323-34.] As further evidence that Appellee's negligence caused the accident, Appellant presented one of the policemen that investigated the accident, who testified on direct examination in accordance with the conclusions reached in the police report, which was also admitted into evidence. [RA, Vol.3, pp. 323-34.] The police report and the officer's testimony on direct indicated that Appellant's version of the accident was correct, that he was rear-ended by Appellee and then lost control of his vehicle, went off the right shoulder and then re-entered the freeway. [RA, Vol.3, pp. 323-34.] However, on cross-examination the officer stated that the physical evidence at the scene did not rule out the version Appellee put forth, that Appellant lost control of the vehicle first, went off the roadway and then re-entered the freeway, where the collision took place. [RA, Vol.3, pp. 323-34.]

On September 25, 1989, the arbitrator issued a decision in favor of Appellee. [RA, Vol.3, pp. 323-334.] The arbitrator wrote:

> Therefore, based upon all the facts presented during the arbitration hearing in this case, the arbitrator is uncertain as to which version of the circumstances causing the motor vehicle collision is the more accurate one, and finds that Plaintiff failed to meet the burden of proof on liability.

[RA, Vol.3, pp. 323-34.] Appellee had asserted a counterclaim against Appellant for allegedly filing a frivolous claim, asking for attorney's fees, but the arbitrator found that "there were sufficient facts independent of Plaintiff's testimony which tended to support his version of the accident," and the arbitrator ruled against Appellee on the counterclaim and denied her request for attorney's fees and costs. [RA, Vol.3, pp. 323-34.]

On September 29, 1989, Appellant timely appealed the arbitrator's decision and requested a *trial de novo* pursuant

to Rule 22 of the Hawaii Arbitration Rules. [RA, Vol.1, pp. 56-63.] Thereafter, more discovery was done by both sides, with interrogatories propounded, depositions taken, and records subpoenaed. [RA, Vol.1, pp. 64-69, 88-94 et seq.] On March 21, 1991, counsel for Plaintiffs Nevin and Jo Anne Keaulii filed a motion to withdraw as counsel for Plaintiff Jo Anne Keaulii, who had instituted divorce proceedings against her husband, creating a conflict of interest. [RA, Vol.3, pp. 28-35.] On May 22, 1991 an order granting the motion to withdraw as counsel was filed, and the parties subsequently stipulated to dismiss with prejudice Plaintiff Jo Anne Keaulii's claims. [RA, Vol.3, pp. 77-78, 182-83.]

On June 21, 1991 a settlement conference was held in the chambers of the Honorable Frank Takao, at which time Judge Takao proposed that Appellant simply withdraw his claim, and in consideration Defendant would withdraw her counterclaim; Judge Takao also admonished Appellant that were he to *proceed to trial and lose*, sanctions may be levied against him under Rules 25 and 26 of the Hawaii Arbitration Rules. [RA, Vol.3, pp. 318-322.]

On July 26, 1991 a pre-trial conference was held in the chambers of the assigned trial judge, the Honorable Thomas K. Kaulukukui, Jr. [RA, Vol.3, pp. 184-85.] Appellant informed the court that because of substantial expenses incurred in his contested divorce proceeding, which was about to go to trial, as well as the possibility that he would also be sanctioned were he to lose at trial, he had decided to dismiss his suit with prejudice, which the court allowed him to do so pursuant to Rule 41(a)(2) of the Hawaii Rules of Civil Procedure. [RA, Vol.3, pp. 184-85.] Appellant's motion to dismiss Appellee's counterclaim was granted by Judge Kaulukukui on the basis that the court was without jurisdiction to hear the counterclaim, which alleged that Appellant had filed a frivolous claim; the court found that since there was never a final adjudication on Appellant's claim, the statutory prerequisite of Section 607-

14.5 was not met and it lacked jurisdiction to rule on the counterclaim and assess attorney's fees against Appellant. [RA, Vol. 3, pp. 318-322.]

However, the court asserted jurisdiction "as trial judge, Arbitration Judge, or otherwise" to hear post-dismissal motions made by either party [RA, Vol.3, pp. 184-85], and on August 21, 1991 Appellee filed a "Motion for Sanctions under Rule 26 of the Hawaii Arbitration Rules." [RA, Vol.3, pp. 192-314.] On September 26, 1991 the court issued an "Order Granting Defendant Mickie Simpson's Motion for Sanctions under Rule 26 of the Hawaii Arbitration Rules." [RA, Vol.3, pp. 335-37.] The court stated, "Plaintiff is subject to sanctions under Rule 26." [RA, Vol.3, pp. 335-37.] On October 4, 1991 said order was appealed. [RA, Vol.3, pp. 338-343.] The appeal was docketed on November 13, 1991, with Appellant's Opening Brief due on or before December 23, 1991.

III. STATEMENT OF POINTS ON APPEAL.

A. THE LOWER COURT COMMITTED A REVERSIBLE LEGAL ERROR WHEN IT RULED THAT "PLAINTIFF IS SUBJECT TO SANCTIONS UNDER RULE 26" OF THE HAWAII ARBITRATION RULES BECAUSE THE AWARD OF SANCTIONS VIOLATED RULE 26. [RA, Vol. 3, p. 336; Appendix A, p. 2.]

IV. STANDARD OF REVIEW.

The lower court's interpretation and application of the Arbitration Rules presents a question of law; therefore, it is not binding on the appellate courts and is fully reviewable. *Molokoa Village Development Co. v. Kauai Elec. Co., Ltd.*, 60 Haw. 582, 593 P.2d 375 (1979); *Wahlschlegel v. Uhlmann-Kihei, Inc.*, 4 Haw. App. 123, 662 P.2d 505 (1983); *Hana Ranch, Inc. v. Kumakahi*, 6 Haw. App. 341, 720 P.2d 1023 (1986).

V. QUESTIONS PRESENTED ON APPEAL.

Whether the lower court committed a reversible legal error when it ruled that "Plaintiff is subject to sanctions under Rule 26" of the Hawaii Arbitration Rules because the award of sanctions violated Rule 26? [RA, Vol. 3, p. 334; Appendix A, p.2.]

VI. ARGUMENT

A. THE AWARD OF SANCTIONS WAS MADE IN VIOLATION OF RULE 26 OF THE HAWAII ARBITRATION RULES

The lower court sanctioned Appellant purportedly under Rule 26 of the Hawaii Arbitration Rules. However, that Rule states in pertinent part:

> *SANCTION FOR FAILING TO PREVAIL IN THE TRIAL DE NOVO*
>
> (A) *After the verdict is received and filed, or the court's decision rendered* in a trial *de novo*, the trial court may, in its discretion, impose sanctions, as set forth below, against the now prevailing party whose appeal resulted in the trial *de novo*.
>
> * * *
>
> (C) Sanctions imposed against a plaintiff will be *deducted from any award rendered.* Sanctions imposed against a defendant will be *added to any award rendered.* (emphasis added).

As is clear from the pain, unmistakable language of the rule, sanctions are only authorized after a jury verdict or court decision has been rendered. In other words, there must be a final decision on the merits, either a jury verdict or court decision, before the court can exercise its discretion to award sanctions. Section A provides authority to levy sanctions *after* the verdict or bench decision. It is hard to envision clearer language in a statute or rule of

court. Section C contains language that clearly implies that a final decision is a necessary prerequisite because it states that sanctions against a plaintiff will be "deducted from any award rendered," and sanctions against a defendant will be "added to any award rendered." Not only is the jury award or court award in the trial *de novo* the means of prescribing *when* sanctions may be awarded in the court's discretion, but it provides *how* sanctions are to be awarded. In other words, the jury or court award in the trial *de novo* provides the measuring stick: sanctions either offset an unfavorable award a plaintiff received in a trial *de novo*, or they augment an award that was unfavorable to a defendant. The jury or court award is compared to the arbitration award and the 15% formula provided for in Rule 25 is applied.

In the instant case, the court seemingly ignored the express language in Sections A and C of Rule 26, and instead attempted to rely on Section D, which states:

> In determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii.

However, this section only provides general guidelines as to when the court should exercise its discretion to impose sanctions, after the prerequisites in the previous provisions are satisfied. Before that discretion can even be exercised the threshold issue set forth in Sections A and C must be met: a jury award or court decision has to be rendered. That the language of Sections A and C control over the general language of Section D is also borne out by the following principles of jurisprudence.

It is well established that the fundamental starting point for interpreting a statute or rule of court is the language itself, and where the language is plain and unambiguous, a court's sole duty is to give effect to the plain and obvious meaning. *Kaiser Foundation Health Plan, Inc. v. Depart-*

ment of Labor and Industrial Relations, Unemployment Ins. Div., 70 Haw. 72, 762 P.2d 796 (1988); *National Union Fire Ins. Co. v. Ferreira*, 71 Haw. 341, 790 P.2d 910 (1990). Furthermore, a departure from the plain and unambiguous language cannot be justified without a clear showing that the legislature intended that some other meaning be given the language. *State v. Mehau*, 68 Haw. 270, 711 P.2d 727 (1985). The language in Rule 26(A), "after the verdict is received and filed or the court's decision rendered" is clear and unambiguous and should be given its plain and obvious meaning. So is the language in Rule 26(C) "deducted from any award rendered" and "added to any award rendered." The plain and obvious meaning is that a jury or court award must be made, and then the amount sanctioned is applied to that award.

Appellant submits that the clear, unmistakable language of Rule 26(A) and (C) obviates the need for statutory construction and that before the Court could use its discretion under Rule 26(D), the requirements laid down by Sections A and C must be met. However, granting *argumendo* that Section D of Rule 26 generally allows the Court to impose sanctions, under principles of statutory construction it is clear that the specific language of sections A and C govern over the general language of section D. The doctrine of "noscitur a sociis" requires that more general and more specific words must be considered together in determining meaning, but the general words are restricted to a meaning that *should not be inconsistent with the narrower meanings of the more specific words of the statute. In re Pacific Marine & Supply Co., Ltd.*, 55 Haw. 572, 524 P.2d 890 (1974).

Another principle of statutory construction is "expressio unius exclusion alterius," or "express mention and implied exclusion," which is based on the presumption that by providing a specific remedy, the legislature intended to exclude others. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, cert denied

100 S.Ct. 49, 444 U.S. 826, 62 L.Ed. 33, on remand 502 F.Supp 392 (1978). By providing a very specific remedy to recover sanctions in sections 26(A) and (C), the drafters impliedly excluded other remedies. Thus, Rule 26(D) is not meant to provide an alternative remedy to recover sanctions. Not only is this consistent with statutory interpretation, but it makes perfect sense. If Rule 26(D) were meant to provide blanket authority to impose sanctions on a case by case basis without satisfying the requirements of sections A and C, then section D would in effect swallow up sections A and C, rendering the more specific language in those two sections useless surplusage. The drafters of the rule could not have possibly have intended such a result. The more plausible reading of Rule 26 is that sections A and C provide the foundation for imposing sanctions, in the discretion of the court, with section D providing a general guideline as to when the court should exercise that discretion, *if it has authority under sections A and C.* Section 26(B) provides what sanctions are available to the court.

Clearly a rule that is essentially punitive, such as Rule 26, should be strictly construed or it would have a "chilling effect" on all litigants, and may very well undermine the right to a jury trial in civil cases, guaranteed by the 7th amendment to the U.S. Constitution, and Article I, Section 13 of the Hawaii State Constitution.

Moreover, were fees and costs to be levied against a party without a final adjudication on the merits, there would be little or no incentive for parties to withdraw or dismiss their claims voluntarily after conducting discovery and assessing their prospects. A party may as well empanel a jury and go through a lengthy trial. In the instant case, Appellant withdrew his claim because of mounting legal expenses and fees in his protracted divorce case, as well as the specter of being assessed sanctions *if he were to lose at trial,* as he was admonished by Judge Takao at the settlement conference of June 21, 1991. Ironically, Ap-

pellant took Judge Takao's advice and withdrew his claim, only to be sanctioned anyway! It is indeed ironic that what Appellant was trying to avoid (sanctions) by withdrawing his case the way he did, would up being imposed on him almost unilaterally, without due process or opportunity to defend himself.

It is anticipated that Appellee will try to argue the merits of the case, by pointing out alleged inconsistencies in Appellant's statements, evidence that Appellant had been drinking prior to the accident (as had been Appellee), and so forth. It is highly questionable whether some of this material would have even been admissible into evidence. For instance, the person who drew Appellant's blood for his blood alcohol test was never named as a witness; thus, there was no foundation to introduce evidence of a blood-alcohol test. And even if the points Appellee will raise were admissible, such is hardly tantamount to a final decision on the merits, which is a prerequisite to levying sanctions. Furthermore, the same thing is true with respect to Appellee: there were inconsistencies in her statements and there was evidence of drinking on her part.

The issue is whether the court had authority to levy sanctions under the Rule 26 without a jury or court award being rendered, and Appellant submits that it clearly did not. The court can not simply short-cut a jury or judge's fact-finding and speculate that Appellant would have lost had he gone to trial. The court, being without basis in law and in fact, committed reversible error in levying sanctions against Appellant under Rule 26 of the Hawaii Arbitration Rules.

VII. CONCLUSION

The court lacked the statutory authority under Rule 26 to levy sanctions against Appellant. It did not follow the procedure set forth in Rule 26 of the Arbitration Rules, and it erred in granting Appellee's motion for sanctions under that rule. For all of the foregoing reasons, this

Court should vacate the lower court's Order Granting Defendant Mickie Simpson's Motion for Sanctions Under Rule 26 of the Hawaii Arbitration Rules, with instructions that each party is to bear its own attorney's fees and costs.

VIII. STATEMENT OF RELATED CASES.

Appellant knows of no related cases.

DATED: Honolulu, Hawaii, Dec. 23, 1991.

Respectfully submitted,

BY: /s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
THOMAS J. KASTER
THOMAS E. WALSH
Attorneys for Appellant
NEVIN KEAULII

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 88-3890
(Motor Vehicle Tort)

NEVIN KEAULII,
Plaintiff-Appellant,

and

JO ANNE KKEAULII,
Plaintiff,

vs.

MICKIE SIMPSON,
Defendant-Appellees.

APPEAL FROM THE ORDER GRANTING DEFENDANT MICKIE SIMPSON'S MOTION FOR SANCTIONS UNDER RULE 26 OF THE HAWAII ARBITRATION RULES; NOTICE OF ENTRY FILED SEPTEMBER 26, 1991

FIRST CIRCUIT COURT

HONORABLE ROBERT G. KLEIN
HONORABLE PATRICK K.S.L. YIM
HONORABLE PHILIP CHUN
HONORABLE SIMEON ACOBA, JR.
HONORABLE FRANK TAKAO
HONORABLE THOMAS K. KAULUKUKUI, JR.
Judges

PLAINTIFF-APPELLANT'S MOTION FOR RECONSIDERATION

COMES NOW Plaintiff-Appellant, NEVIN KEAULII, by and through his counsel undersigned and hereby moves this Honorable Court to reconsider its opinion filed on

March 11, 1993, for the reason that the opinion did not make a determination on the constitutional question, as raised by the Appellant, of whether Rule 26 of the Hawaii Arbitration Rules, if strictly construed, would have a "chilling effect" on all litigants, and thereby undermine the right to a jury trial in civil cases, guaranteed by the 7th amendment to the U.S. Constitution, and Article 1, Section 13 of the Hawaii State Constitution.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the memorandum of law and certificate of good faith attached hereto, and the records and files in this case.

DATED: Honolulu, Hawaii_____

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
RICHARD M. BERGER
THOMAS E WALSH
PAUL M. DOLD

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 88-3890
(Motor Vehicle Tort)

NEVIN KEAULII,
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and

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APPEAL FROM THE ORDER GRANTING DEFENDANT MICKIE SIMPSON'S MOTION FOR SANCTIONS UNDER RULE 26 OF THE HAWAII ARBITRATION RULES; NOTICE OF ENTRY FILED SEPTEMBER 26, 1991

HONORABLE ROBERT G. KLEIN
HONORABLE PATRICK K.S.L. YIM
HONORABLE PHILIP CHUN
HONORABLE SIMEON ACOBA, JR.
HONORABLE FRANK TAKAO
HONORABLE THOMAS K. KAULUKUKUI, JR.
Judges

MEMORANDUM OF LAW

The Appellant filed a lawsuit against Appellee as a result of injuries he sustained in a motor vehicle accident on the H-1 freeway on September 5, 1987. The case was arbitrated through the Court Annexed Arbitration Program and at the hearing the Appellant testified that Ap-

pellee drove her vehicle into the rear of Appellant's vehicle, causing a collision. On September 25, 1989, the arbitrator issued a decision in favor of the Appellee.

On September 29, 1989, the Appellant timely appealed the arbitrator's decision and request a trial *de novo* pursuant to Rule 22 of the Hawaii Arbitration Rules. On June 21, 1991, a settlement conference was held in the chambers of the Honorable Frank Takao, at which time Judge Takao proposed that Appellant simply withdraw his claim. On July 26, 1991, a pre-trial conference was held in the chambers of the assigned trial judge, the Honorable Thomas K. Kaulukukui, Jr. The Appellant informed the court that because of substantial expenses incurred in his contested divorce proceedings, which was about to go to trial, as well as the possibility that he would also be sanctioned were he to lose at trial, he had decided to dismiss his suit with prejudice, which the court allowed him to do so pursuant to Rule 41 (a) (2) of the Hawaii Rules of Civil Procedure.

The court asserted jurisdiction "as trial judge, Arbitration Judge, or otherwise" to hear post-dismissal motions made by either party, and on August 21, 1991, the Appellee file a "Motion for Sanctions under Rule 26 of the Hawaii Arbitration Rules." On September 26, 1991, the court issued an "Order Granting Defendant Mickie Simpson's Motion for Sanctions under Rule 26 of the Hawaii Arbitration Rules." On October 4, 1991, said Order was appealed. The appeal was docketed on November 13, 1991.

On March 11, 1993, the appellate court issued its decision which held that a "circuit court's decision to grant a party's motion to dismiss with prejudice prior to the commencement of a jury being sworn or evidence being taken is a "decision rendered in a trial *de novo*" for which sanctions may be imposed.

However, the decision of the court did not discuss the question of whether Rule 26 of the Hawaii Arbitration

Rules, if strictly construed, would violate the right to a jury trial in civil cases, as guaranteed by the 7th amendment to the U.S. Constitution, and Article I, Section 13 of the Hawaii State Constitution. This question was raised and discussed on Page 10 of the Appellant's Opening Brief.

II. ARGUMENT

The legal system these days is such that a traffic accident case, among other kinds of cases, once filed in court, goes to arbitration presided by an attorney appointed by the court. In such an arbitration proceeding, there is no jury and no court. Presumably to protect the parties right to due process, his day in court, his constitutional right to a jury trial, the law allows the losing party in arbitration to appeal the decision and seek a trial *de novo*, meaning a new trial. This is a constitutional right of the party. In this case, the Appellant Keaulii is obviously *penalized* for seeking his constitutional right of appeal, although later he had to withdraw the same due to unforeseen circumstances as discussed in the Appellant's Opening Brief.

Furthermore, Rule 26 of the Hawaii Arbitration Rules is vague and ambiguous and overly comprehensive and would have a "chilling effect" given the extensive definition of "trial *de novo*" provided by this court in its decision in this matter. If such a meaning attaches to "trial *de novo*," it would have an unprecedented harmful result of a party being sanctioned only because he filed a Notice of Appeal. Given the overly comprehensive extent given to "trial *de novo*," a party who files a notice of appeal and would withdraw the same that same day, hypothetically, *can then be sanctioned.* It must be noted that the reason for withdrawal of appeal seems to be irrelevant andabsolutely no guidelines have been set by the law.

III. CONCLUSION

In consideration of the foregoing, the Appellant asks this Honorable Court to reconsider its decision filed March

11, 1993, in this matter. Specifically, the Appellant requests that this Honorable Court reconsider the constitutional implications of its March 11, 1993 decision.

DATED: Honolulu, Hawaii, March 22, 1993.

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
RICHARD M. BERGER
THOMAS E. WALSH
PAUL M. DOLD

Attorneys for Plaintiff-Appellant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendants.

DEFENDANT MICKIE SIMPSON'S ANSWER TO COMPLAINT; DEMAND FOR JURY TRIAL

DEFENDANT MICKIE SIMPSON'S ANSWER TO COMPLAINT

Defendant MICKIE SIMPSON (hereinafter "Defendant"), by and through her undersigned counsel, for answer to the Complaint herein, alleges and avers as follows:

FIRST DEFENSE

1. The Complaint fails to state a claim in whole or in part upon which relief can be granted.

SECOND DEFENSE

2. Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1, 3 and 6.

3. Paragraph 2 is admitted.

4. Paragraphs 4, 5, 7, 8, 9, 10, 10a, 10b, 10c, and 10d are denied.

THIRD DEFENSE

5. Plaintiffs NEVIN KEAULII and JO ANNE KEAULII or each of their claims are barred by their failure to meet the threshold requirements of Hawaii no-fault statute, H.R.S. 294, et. seq.

FOURTH DEFENSE

6. Plaintiffs were negligent and their negligence was a proximate or contributing cause of the injuries and damages of which they now complain and any finding of negligence, fault or liability on the part of the Defendant should therefore be defeated by, or reduced by said contributory negligence.

FIFTH DEFENSE

7. Plaintiffs were aware of the voluntarily assumed a risk which was a proximate or contributed cause of the injuries and damages of which they now complain and they therefore cannot recover on account thereof.

FIFTH DEFENSE

8. Defendant asserts the defense of unavoidable accident.

SIXTH DEFENSE

9. All claims against this Defendant are barred by the application of the doctrines of laches, estoppel and waiver.

SEVENTH DEFENSE

10. All claims against Defendant have been discharged by way of release and are therefore barred.

EIGHTH DEFENSE

11. The service and service of process upon this Defendant was defective.

WHEREFORE, Defendant prays as follows:

1. That the Complaint be dismissed with prejudice.

2. That she be awarded his costs and attorneys' fees.

3. That this Court grant such other and further relief that is just and proper under the premises.

DATED: Honolulu, Hawaii, January 9, 1989.

/s/ Jonathan L. Ortiz
JONATHAN L. ORTIZ
PAUL T. YAMAMURA
Attorneys for Defendant
MICKIE SIMPSON

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 88-3890-12

NEVIN KEAULII and JO ANNE KEAULII,
Plaintiffs,

vs.

MICKIE SIMPSON,
Defendants.

DEMAND FOR JURY TRIAL

DEMAND FOR JURY TRIAL

COMES NOW Defendant MICKIE SIMPSON and hereby demands trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, January 9, 1989.

/s/ Jonathan L. Ortiz
JONATHAN L. ORTIZ
PAUL T. YAMAMURA
Attorneys for Defendant
MICKIE SIMPSON